IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1972

No. 72-746

THE PUYALLUP TRIBE, *Petitioner*

v.

THE DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

SLADE GORTON,
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JOSEPH L. CONIFF,
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600 No. Capitol Way,
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February 22, 1973.

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MEMORANDUM FOR THE DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

The Federal Government, on behalf of the Puyallup Tribe of Indians, has filed a petition for a writ of certiorari to the Supreme Court of the State of Washington in this cause. By order of the Court, the Washington State Department of Game has been directed to file a memorandum responsive to the Government's petition.[1]

[1]It should be noted that the Department of Game of the State of Washington has similarly filed a petition for a writ of certiorari to the Supreme Court of the State of Washington on this same opinion. *Department of Game v. Puyallup Tribe*, 80 Wn.2d 561 (1972) U. S. Supreme Court Docket No. 72-481, October Term, 1972.

The Government's memorandum in opposition to Game's previously filed petition for a writ of certiorari to the same opinion of the court below is apparently predicated upon their effort to limit the scope of the questions which may be argued by Game should this Court grant the Government's petition.[1] It is Game's position that *both* the petitions for a writ of certiorari filed by the Government and by Game should be granted so that all questions may be fully presented to the Court.

The Government argues in its petition that members of the Puyallup Tribe of Indians are being discriminated against in enjoyment of their claimed treaty commercial net fishing rights for game fish because sportsmen are allowed, under state law and regulation, to take fish at these same locations by means of hook and line. Game submits that the Government has misconceived the thrust of this Court's opinion in *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968). Justice Douglas, speaking for a unanimous Court, pointed out that the "in common with" language of the treaty in question incorporated the equal protection concepts of the Fourteenth Amendment. 391 U.S. at 401-403. The issue to be resolved is whether the state, in accordance with the opinion below, must discriminate against all non-Indians insofar as they are permitted to fish with hook and line for game fish in the Puyallup River by authorizing special Puyallup Indian only commercial

[1] See: *Irvine v. California*, 347 U.S. 128 at 129 (1954).

net fisheries for game fish at these same locations along this river. Game believes that the position of the parties are diametrically opposed in interpreting the *Puyallup* decision, *supra*, and that this case presents a question of substantial and fundamental constitutional importance which justifies this Court in granting both the Government's and Game's petitions for writ of certiorari.

An additional reason for granting the requested writs of certiorari should be mentioned. Attached to this memorandum as appendix is a copy of a complaint entitled *United States of America v. State of Washington*, United States District Court, Western District of Washington, Civil No. 9213 (Appendix "A"). This case is presently set for trial on July 2, 1973. In this case the Federal Government sued the State of Washington seeking declaratory and injunctive relief against the application of the state conservation laws as applied to a great many Indian tribes resident in Western Washington. Fifteen Indian tribes have been permitted to intervene in this case.

Also attached is a copy of the complaint entitled *United States of America v. State of Washington*, United States District Court, Western District of Washington, Civil No. 39-71C3 together with a copy of the court's memorandum decision and order and the Government's notice of appeal to the Ninth Circuit Court of Appeals (Appendix "B"). This case

was filed against the State of Washington as a result of the Government's interpretation of footnote one of *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968) regarding the status of the Puyallup Indian Reservation.

Game submits that a multiplicity of litigation can and should be properly avoided in the lower courts and urges this Court to grant both the Government's and Game's petitions for writ of certiorari in this matter.

Respectfully submitted:

SLADE GORTON,
Attorney General,
State of Washington,

JOSEPH L. CONIFF,
Assistant Attorney General,

APPENDIX "A"

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United States of America

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CIVIL No. 9213
COMPLAINT

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF WASHINGTON,
Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

The United States of America, by Stan Pitkin, United States Attorney for the Western District of Washington, acting under authority of The Attorney General and at the request of the Secretary of the Interior, complains and alleges as follows:

FIRST CLAIM FOR RELIEF

1. This Court has jurisdiction by reason of the fact that the United States is plaintiff. 28 U.S.C. § 1345.

2. The United States brings this action on its

own behalf and on behalf of the Puyallup Tribe of the Puyallup Reservation, the Nisqually Indian Community of the Nisqually Reservation, the Muckleshoot Indian Tribe of the Muckleshoot Reservation, the Skokomish Indian Tribe of the Skokomish Reservation, the Makah Indian Tribe of the Makah Indian Reservation, the Quileute Tribe of the Quileute Reservation, and the Hoh Tribe or Band of Indians which are tribes or communities of Indians recognized as such by the Secretary of the Interior.

3. The United States has entered into treaties with the tribes named in paragraph 2 as follows:

The Treaty of Medicine Creek on December 26, 1854, with the Puyallup, Nisqually and other Tribes, 10 Stat. 1132.

The Treaty of Point Elliott on January 22, 1855, with various tribes and bands including the Indians who now comprise the Muckleshoot Indian Tribe, 12 Stat. 927.

The Treaty of Point No Point on January 26, 1855, with the Skokomish and other Tribes, 12 Stat. 933.

The Treaty with the Makahs on January 31, 1855, 12 Stat. 939.

The Treaty of Olympia on July 1, 1855 and January 25, 1856, with the different tribes and bands of the Qui-naielt and Quil-leh-ute Indians, including the Hoh Tribe or Band of Indians, 12 Stat. 971.

Each of said treaties contains a provision securing to the Indians certain off-reservation fishing rights. The following provision from the Treaty of Medicine Creek is typical of these provisions:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, * * * *Provided, however*, that they shall not take shellfish from any beds staked or cultivated by citizens, * * *."

Each of the tribes named has usual and accustomed fishing places within the western portion of the State of Washington, including, among others, the Nisqually River, the Puyallup River and Commencement Bay, the White River, the Green River, the waters of Hood Canal and the rivers flowing into said Canal, the Straits of Juan de Fuca, the Quileute River and its tributaries, and the Hoh River. Each of the tribes named has rights secured by said treaties to take fish, including the species commonly known as steelhead, at its usual and accustomed fishing places.

4. Subsequent to the execution of the treaties and in reliance thereon, the members of the tribes have continued to fish for subsistence and commercial purposes at the usual and accustomed places. Such fishing provided and still provides an important part of their subsistence and livelihood.

5. The rights of said tribes of taking fish at all usual and accustomed places guaranteed by said treaties are subject to regulation by the defendant only to the extent necessary for conservation. These rights do not derive from state authority and must be recognized and protected by the defendant. The

defendant's authority to restrict the exercise of such rights is different from and more limited than its authority to restrict the state-conferred fishing privileges of persons who are not the beneficiaries of such rights. Proper recognition and protection of the rights require that before restricting their exercise the defendant must (a) deal with the matter of the Indians' treaty fishing rights as a subject separate and distinct from that of fishing by others, (b) so regulate the taking of fish that the tribes and their members will be accorded an opportunity to take, at their usual and accustomed places by reasonable means feasible to them, a fair and equitable share of all fish which the defendant permits to be taken from any given run, and (c) establish that it is necessary (as distinguished from merely convenient) for conservation to impose the specifically prescribed restriction on the exercise of the treaty right.

6. The defendant has failed and refused to recognize and protect the tribes' treaty rights. It has, with limited exceptions, failed and refused to deal with fishing by the beneficiaries of such rights as a separate subject when formulating regulations to govern the taking of fish in the waters subject to the defendant's jurisdiction. It has, with limited exceptions, denied that such rights invest the beneficiaries with any privileges and immunities greater than those which the defendant chooses to accord citizens generally. It has dealt with Indian treaty rights as though they were state-conferred privileges, any

exercise of which the state is not only free to, but is required to, regulate to the same extent and in the same manner as it regulates fishing by persons not entitled to exercise said rights. In conformity with this premise, defendant, with limited recent exceptions, contends it has no authority to, and has refused to, recognize or allow any manner of exercise of the right, or its exercise during any time, at any place, or for any purpose the defendant does not allow other persons to take fish. It has failed and refused to attempt to so regulate fishing in waters subject to its jurisdiction as to accord the beneficiaries of such right an opportunity to catch, at their usual and accustomed places and by reasonable means feasible to them, a fair and equitable portion of the fish which are available for catching from a particular run consistent with adequate escapement for spawning and reproduction. It has not determined what specific restrictions must necessarily be imposed upon the exercise of the treaty rights in the interest of conservation and informed the beneficiaries thereof in advance of enforcement what those restrictions are.

It has so framed its statutes and regulations as in many instances to allow all the harvestable fish from given runs to be taken by those with no treaty rights before such runs ever reach the usual and accustomed fishing places to which the treaties apply.

Defendant has by statute and regulation totally

closed many of the usual and accustomed areas of said tribes to all forms of net fishing while permitting commercial net fishing elsewhere on the same runs of fish.

Defendant has by statute and regulation set aside one species of fish, the species commonly known as steelhead, for the exclusive use and benefit of a single category of persons, namely sportsmen, and has imposed limitations on the means by which, the purpose for which, and the numbers of which said species may be taken that are in derogation of the treaty rights of said tribes.

7. Defendant has not undertaken, or caused to be undertaken, any studies, research, or experimentation—or if it has, has not introduced the results thereof into any hearing or public proceeding at which state fishing laws or regulations were considered or enacted—of the extent to which it is necessary for the defendant to restrict the exercise of fishing rights secured to Indian tribes by treaties of the United States.

8. In devising, adopting and promulgating the regulations by which they authorize the taking of fish for commercial or sports purposes by persons subject to the state's jurisdiction, and in establishing and carrying out fishery management policies and programs and determining conservation objectives, the defendant and its officers and agents have not given recognition to, or made proper allowance for,

the rights secured to Indian tribes by treaties of the United States.

9. The defendant and various of its officers and agents claiming to act in their official capacities on behalf of the defendant, have seized nets and other property of members of the aforementioned tribes and have harassed, intimidated, and threatened said members or caused them to be arrested and prosecuted, for allegedly violating state laws or regulations pertaining to fishing for, taking of, or possession of, fish which were taken or sought to be taken by said members in the lawful exercise of rights secured by the treaties, and have confiscated or released fish belonging to said members and taken in the exercise of said rights, have interfered with, obstructed, and attempted to prevent the transportation or sale of such fish so taken by members of said tribes and have otherwise harassed and interfered with said members in the exercise of said rights. Defendant, its officers and agents, assert their intention to continue these actions. In so acting and threatening to act, the defendant, its officers and agents are acting wrongfully and in derogation of rights secured by the treaties.

10. As a result of the said wrongful acts of defendant, the tribes and their members are being unlawfully deprived of their treaty right, privilege, and immunity to fish at many of their usual and accustomed places and have suffered, and will con-

tinue to suffer, irreparable damage. The plaintiff, the tribes and members of the tribes, have no adequate remedy at law because

(a) the damages which have been and will be sustained are not susceptible of monetary determination;

(b) the right of the Indians to fish at their usual and accustomed places conferred by treaty with the United States is unique and should be specifically protected; and

(c) in the case of criminal prosecutions threatened by the defendant or its officers or agents purporting to act under the authority of the state statutes, these Indians have no remedy at all except at the risk of suffering fines, imprisonment and confiscation of property, involving a multiplicity of legal proceedings.

11. An actual controversy exists between the plaintiff on the one hand and the defendant on the other as to the nature and extent of the treaty fishing rights of the tribes named in this complaint and the attempted regulation thereof by the defendant.

SECOND CLAIM FOR RELIEF

12. Plaintiff restates and re-alleges the allegations of paragraphs 1 through 11 of this complaint.

13. Statutes of the defendant enacted without regard to Indian treaty rights make it unlawful to use various types of appliances including a set net, a weir, or any fixed appliance within any waters of the state for the purpose of catching salmon (RCW 75.12.060) or to lay or use any net for the purpose

of taking fish which the defendant has classified as game fish, or lay or use any net capable of taking game fish except as permitted by regulation of the Department of Fisheries (RCW 77.16.060). Defendant's statutes also make it unlawful to spear, gaff or snag salmon except as may be authorized by the Director of Fisheries (RCW 75.12.070), to use reef nets except in limited areas specified by statute (RCW 75.12.160). Other statutes, including RCW 75.08.080, give the defendant's Director of Fisheries broad authority to regulate the taking of salmon, and give defendant's Game Commission broad authority to regulate the taking of steelhead and other "game fish" (RCW 77.12.040), which authorities have been exercised without proper regard for Indian treaty rights, make violation of provisions of defendant's fisheries or game codes or regulations punishable as a crime (RCW 75.08.260, RCW 77.16.020, RCW 77.16.030, RCW 77.16.040, and provide for seizure and forfeiture of gear used or held with intent to use unlawfully (RCW 77.12.100)). Nets and other items used or "had or maintained for the purpose of" taking game fish contrary to law or Game Commission rule or regulation are subject to summary seizure and destruction by game protectors "without warrant or process." (RCW 77.12.130). Among other restrictions, regulations of the defendant issued by said Director of Fisheries make it unlawful to fish for or possess food fish from any waters over which the State of Washington has jurisdiction

except as provided for in state statutes or in regulations of the State Department of Fisheries (WAC 220-20-010(1) and (2)). These regulations also make it unlawful to have an unattended gill net in the commercial salmon fishery (WAC 220-20-010 (5)), or to place commercial food fish gear in any waters closed to commercial fishing (WAC 220-20-010(6)), or to attempt to take food fish by various specified means including gaffing, snagging, dip netting, spearing, and others, or to possess food fish so taken (with limited exceptions in connection with personal use angling) (WAC 220-20-010(11)), or to fish for or possess food fish taken contrary to provisions of any special season or emergency closed period prescribed in Chapter 220-28 of the Washington Administrative Code (WAC 220-20-010(16)), or to take salmon "for commercial purposes" i.e., by means other than angling—within three miles of any river or stream flowing into Puget Sound (WAC 220-20-015(2)), or within areas specified in WAC 220-47-020, or to fish for food fish for personal use by any means other than angling unless otherwise provided or possess fish so taken (WAC 220-56-020 (2)). Various officers and agents of the defendant have stated their intention on behalf of the defendant to apply such laws and regulations to all Indians fishing at their Tribe's usual and accustomed places in the exercise of rights secured by their treaties and have arrested, cited for prosecution, and seized

gear of members of such Tribes for so fishing in violation of such laws and regulations.

14. Defendant's Director of Fisheries has promulgated regulations which give limited recognition to the treaty fishing rights of some of the Tribes named in paragraph 2 hereof. (Director of Fisheries Orders No. 866, 875, 885). Said regulations contain limitations and restrictions on the exercise of treaty rights that are not reasonable and necessary for conservation and are not the least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes. Defendant's Director of Fisheries has failed and refused to promulgate regulations to provide recognition to, or permit exercise of, the treaty fishing rights of some Indian Tribes having treaty fishing rights, including the Muckleshoot Indian Tribe and the Skokomish Indian Tribe.

15. The effect of RCW 75.12.060 and 77.16.060 and the regulations referred to in paragraph 13 is to close permanently to the taking of food fish by any means other than angling, a substantial portion of the area which contains numerous and important usual and accustomed fishing places of the Tribes, while permitting commercial fishing in other areas on migratory fish runs which pass by such tribal fishing places. The defendant, its officers and agents, have failed to recognize and to provide sufficiently for the exercise of the treaty fishing rights of the Tribes,

and their members, at their usual and accustomed places which failure constitutes a denial of the treaty fishing rights and an unlawful and unreasonable discrimination in favor of those fishing commercially or for recreation and pleasure and against the Tribes and their members. Such action has not been and cannot be justified as necessary for the conservation of fish.

16. In devising and adopting the rules and regulations governing the taking of food fish for commercial purposes, the defendant has failed to give proper recognition or make adequate provision for the exercise of treaty fishing rights of Indians at their usual and accustomed places and has adopted regulations which discriminate against the taking of fish at the usual and accustomed places of the previously mentioned Indian Tribes in favor of those who take fish at other locations. In doing so the defendant is unlawfully discriminating against the exercise of Indian treaty fishing rights in the recognition and beneficial use of such treaty rights. Such discrimination results in irreparable damage to such Tribes and their members.

WHEREFORE, plaintiff prays that the Court:

1. ORDER, ADJUDGE, and DECREE that

(a) Each of the tribes named in this complaint owns and it may authorize its members to exercise a right derived from the laws and treaties of the United States to take fish at its usual and accustomed places,

which right is distinct from any right or privilege of individuals to take fish derived from common law or state authority, and the exercise of which is subject to state control only through such statutes or regulations as have been established to be necessary for the conservation of the fishery and which do not discriminate against the exercise of such right;

(b) Before defendant may regulate the taking and disposition of fish by members of said tribes at usual and accustomed fishing places pursuant to treaties between said tribes and the United States:

(i) It must establish by hearings preliminary to regulation that the specific proposed regulation is both reasonable and necessary for the conservation of the fish resource. In order to be necessary, such regulations must be the least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes; the burden of establishing such facts is on the state.

(ii) Its regulatory agencies must deal with the matter of the Indians' treaty fishing as a subject separate and distinct from that of fishing by others. As one method of accomplishing conservation objectives it may lawfully restrict or prohibit non-Indians fishing at the Indians' usual and accustomed fishing places without imposing similar restrictions on treaty Indians.

(iii) It must so regulate the taking of fish that, except for unforeseeable circumstances beyond

its control, the treaty tribes and their members will be accorded an opportunity to attempt to take, at their usual and accustomed fishing places, by reasonable means feasible to them, a fair and equitable share of all fish which it permits to be taken from any given run.

2. Declare RCW 75.12.060, RCW 75.12.070, RCW 77.08.020, RCW 77.12.130, RCW 77.16.040, 77.16.060, WAC 220.20.010, WAC 220-20-015 (2) and WAC 220-47-020 null and void insofar as they deny or restrict the right of members of the Tribes named in this complaint, acting under tribal authorization, to take fish for subsistence and commercial purposes at their tribe's usual and accustomed fishing places or to possess or dispose of fish so taken.

3. Declare that the defendant, its officers, agents, and employees may not apply the provisions of RCW 75.08.260, RCW 77.12.100, 77.16.020, and 77.16.030 in such manner as to prevent or restrict members of the tribes named in paragraph 2 hereof from taking fish for subsistence and commercial purposes at their tribe's usual and accustomed fishing places or to possess or dispose of fish so taken without previously having established that the imposition of such specific restriction is necessary for the conservation of fish and does not discriminate against the taking of fish pursuant to such treaty right.

4. Enjoin the defendant, its officers, agents and employees from enforcing the provisions of RCW

75.12.060, RCW 75.12.070, RCW 77.08.020, RCW 77.12.130, RCW 77.16.040, RCW 77.16.060, WAC 220.20.010, WAC 220-20-015(2) and WAC 220-47-020 in such manner as to prevent or restrict members of the said tribes from taking fish at their usual and accustomed places in accordance with tribal authorization pursuant to the treaties between those tribes and the United States.

5. Enjoin the defendant, its officers, agents and employees from enforcing the provisions of state laws or regulations in such manner as to prevent or restrict members of said tribes from taking fish at their usual and accustomed places in accordance with tribal authorization pursuant to the treaties between said tribes and the United States without previously having established that the imposition of state regulation is necessary for the conservation of fish and does not discriminate against the taking of fish pursuant to such treaty right.

6. Grant such further and additional relief as the plaintiff may be entitled to.

7. Award plaintiff the costs of this action.

8. Retain jurisdiction of this cause for the purpose of enforcing or supplementing the judgment of this Court.

DATED this 18th day of September, 1970, at Seattle, Washington.

/s/ Signature Affixed
STAN PITKIN
United States Attorney
Western District of Washington

APPENDIX "B-1"

STAN PITKIN
United States Attorney

STUART F. PIERSON
Assistant United States Attorney
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(206) 442-4735

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE COMMITTEE TO SAVE OUR FISH, a corporation; RALPH M. THORPE, JR.; LEONARD OSTRUS; JACK CARRAIDO; RAY SCHWERZLER; WALT GUTOSKI; and the STATE OF WASHINGTON,
Defendants.

CIVIL ACTION
39-71C3

COMPLAINT

THE UNITED STATES OF AMERICA, by Stan Pitkin, United States Attorney for the Western District of Washington, and Stuart F. Pierson, Assistant United States Attorney, its attorneys, alleges:

1. This is a complaint for declaratory judgment in a case of actual controversy, brought pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure, and for such further relief as the interests of justice may require.

2. Jurisdiction of this Court is based upon 28 U.S.C. § 1345.

3. Defendant COMMITTEE TO SAVE OUR FISH (hereinafter "the Committee") is a Washington State corporation, doing business and operating in the Western District of Washington. Defendant RALPH M. THORPE, JR. is president and a director of the Committee and he resides within the Western District of Washington. Defendant LEONARD OSTRUS is vice-president and a director of the Committee and he resides within the Western District of Washington. Defendant JACK CARRAIDO is secretary and a director of the Committee and he resides within the Western District of Washington. Defendant RAY SCHWERZLER is treasurer and a director of the Committee and he resides within the Western District of Washington. Defendant WALT GUTOSKI is a director of the Committee and he resides within the Western District of Washington.

4. The Committee is an organization established for the purpose of conserving and preserving steelhead salmon in the Puyallup, Nisqually, and Green Rivers, and for the purpose of promoting, dramatizing and protecting claims of non-Indians to fish in these waters within the State of Washington.

5. Pursuant to the aforesaid purposes, the Committee, by and through its president, defendant Ralph M. Thorpe, Jr., has taken action designed to establish its claim (a) that persons who are not

Puyallup Indians may fish on the Puyallup River to the same extent as, and with no greater restrictions than those placed upon Puyallup Indians, and (2) that the State of Washington is obliged to enforce its fishing regulations against Puyallup Indians no matter where they fish within the State. This action of the Committee has taken various forms.

6. On or about March 26, 1971, the United States Department of Interior, by its Acting Associate Solicitor, issued a memorandum setting forth its opinion that the Puyallup Indian Reservation was currently defined by those boundaries established by Executive Orders of January 20, 1857 and September 6, 1873. On or about August 11, 1971, that Department issued a supplemental memorandum stating the following opinion:

> 1. The right to fish within the exterior boundaries of the Puyallup Reservation, as established in 1873, and as those boundaries continue to exist today for federal and tribal purposes, must be exclusive. It was exclusive when the reservation was established, *Moore* v. *United States*, *supra*, and *Mason* v. *Sams*, *supra;* since the tribe has not relinquished its right, and since the Congress has not terminated or modified the right, it remains an exclusive right today. If an act of Congress explicitly terminating a reservation does not terminate a hunting right merely implied to be concomitant thereto (*see Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), *a fortiori* acts of Congress neither dissolving nor diminishing a reservation for purposes of tribal jurisdiction do not terminate a fishing right

within the exterior boundaries of a reservation established under a treaty.

2. The State of Washington may not exercise any authority over Puyallup Indians fishing on the Puyallup Reservation because the bed of that river within those boundaries continues to be held in trust by the United States for the benefit of the tribe and therefore constitutes an area over which the laws of the state have not, under RCW 37.12.010 (see our March memorandum), been extended, and could not, under the Act of August 15, 1953, as amended, be extended (without the consent of the tribe).

3. Regarding the question of the extension of the state's fishing regulations to non-Puyallup Indians under the Act of August 15, 1953, or under RCW 37.12.010: To the extent that an answer must depend on an interpretation of the state statute, we do not respond to the question; to the extent that an answer must depend on an interpretation of the federal act, we conclude that the state possesses no more authority to regulate fishing by non-Puyallup Indians within the boundaries of the Puyallup Reservation than it does to regulate such fishing by Puyallup Indians, when fishing by such Indians has been permitted by the Puyallup Tribe. *See Donahue* v. *California Justice Court*, 93 Cal. Rptr. 310 (Ct. App. 1971).

7. Upon information and belief, on or about August 19, 1971, the Committee, by its president, defendant Ralph M. Thorpe, Jr., stated its intention to protest unregulated Indian net fishing on the Puyallup River, by leading a group of people, not Puyallup Indians, onto the Puyallup River to fish with set nets at places within the boundaries of the

Puyallup Reservation as recognized by the United States Department of Interior in the aforesaid memoranda.

8. The intended actions of the Committee, as described in paragraph 7 herein are designed to require and to oblige appropriate Washington State authorities to assume jurisdiction over and regulation of, fishing by all persons on the Puyallup River, including Puyallup Indians as well as those not members of that tribe, within the boundaries of the Puyallup Reservation as recognized by the United States Department of Interior in the aforesaid memoranda.

9. Defendant State of Washington has its capital at Olympia within the Western District of Washington.

10. By Washington state statutes and regulations, and by Washington state court decisions, the State of Washington has authority under state law to regulate fishing by all persons on the Puyallup River, within the boundaries of the Puyallup Reservation as recognized by the United States Department of Interior in the aforesaid memoranda.

11. The aforesaid authority of the State of Washington under state law is in direct conflict with the federally protected rights of the Puyallup Indian Tribe to exclusive fishing rights and regulations thereof upon the Puyallup River flowing through the Puyallup Indian Reservation and over Puyallup Indian lands.

12. An actual controversy within the jurisdiction of this Court exists with respect to the matters stated hereinabove between the plaintiff and the defendants.

13. It is in the public interest for this Court to determine at the earliest practicable date the rights of the parties herein, so that all persons concerned with fishing on the Puyallup River can adjust and determine their actions without disturbance, disruption or interference with the rights of others.

WHEREFORE, plaintiff prays for a judgment declaring the rights and other legal relations of the parties hereto, and declaring specifically that the Puyallup Indian Tribe and its authorized representatives have exclusive right to, and regulation of, all fishing on or in the Puyallup River within the Puyallup Indian Reservation.

PLAINTIFF FURTHER PRAYS for an order permanently restraining and enjoining the defendants, their agents, successors in interest, and all other persons acting in concert or participation with them from in any manner or form assuming jurisdiction over, or regulation of, fishing on the Puyallup River within the Puyallup Indian Reservation; and from in any manner or form interfering or inhibiting the exercise of jurisdiction over, and regulation of, fishing on the Puyallup River within the Puyallup Indian Reservation by The Puyallup Indian Tribe or its authorized representatives.

PLAINTIFF FURTHER PRAYS that this Court order a speedy hearing on the merits of this action and advance it on the calendar pursuant to Rule 57 of the Federal Rules of Civil Procedure.

DATED this 20th day of August, 1971.

/s/ Signature Affixed
STAN PITKIN
United States Attorney

/s/ Signature Affixed
STUART F. PIERSON
Assistant U. S. Attorney

APPENDIX "B-2"
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. 39-71C3

MEMORANDUM DECISION

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

THE STATE OF WASHINGTON, *Defendant*.

The United States Government seeks to enjoin the State of Washington from the enforcement of certain laws bearing on the methods by which the steelhead trout or fish may be captured on the Puyallup River in Pierce County.

In turn, the State of Washington moves this Court for an order declaring that it possesses the

power to regulate the taking of steelhead fish by Indian members and descendants of the Reorganized Puyallup Tribe from the Puyallup River.

This controversy has been before the Supreme Court of the United States and numerous intermediate courts on prior occasions. In describing this controversy, Justice William O. Douglas of the Supreme Court of the United States said in the case of *Puyallup Tribe v. Department of Game of the State of Washington* and the *Nisqually Tribe v. Department of Game of the State of Washington*, 391 U.S. 392:

> "These cases present a question of public importance which involves in the first place a construction of the Treaty of Medicine Creek made with the Puyallup and Nisqually Indians in 1854 (10 Stat. 1132) and secondly the constitutionality of certain conservation measures adopted by the State of Washington allegedly impinging on those treaty rights."

It is interesting to note that both the United States Government and the State of Washington have asked the Supreme Court of the United States to again consider the questions that were presented to that Court. In other words, both have petitioned certiorari. Whether or not the Supreme Court of the United States will reconsider its opinion is only conjecture.

There is no doubt of the constitutionality of the laws of the State of Washington enacted by the State Legislature empowering the Department of Game to regulate the taking of steelhead fish by both non-

Indians and Indians off reservations. The Court has unequivocally passed on that question. At page 398, Justice Douglas said:

> "The treaty right is in terms the right to fish 'at all usual and accustomed places.' We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the *manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the 'usual and accustomed places' *in the 'usual and accustomed'* manner. But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish 'at all usual and accustomed' places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. Act of June 2, 1924, 43 Stat. 253, as superseded by § 201(b) of the Nationality Act of 1940, 8 U.S.C. § 1401 (a)(2). But the manner of fishing, the size of the take, the restriction of "commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

But the United States Government contends that in the instant case the reservation boundaries

that existed in the year 1873 encompassing approximately 18,000 acres of land and some seven miles of the Puyallup River from a point a short distance from the mouth of said river and extending some seven miles upstream entitles the Indians to fish without restriction by the State because the part of the river described is within the present boundaries of the Puyallup Indian Reservation and upon which the Indians have unrestricted right to fish.

The Government contends that the Supreme Court of the United States did not determine the present claim of the United States that fishing within the 1873 boundaries is reservation fishing, vis-a-vis, non-reservation fishing because the issue was never presented to that Court.

At the request of this Court, the brief of the Puyallup Tribe prepared by the attorney for the Tribe was obtained so that this Court could determine the question of whether or not the issue had been presented to the Supreme Court. A reference to the brief shows that it was, and at page 43 of said brief and the first paragraph thereof contains the following language:

> "The Indian petitioners submit that unless and until the Congress enacts a Termination Act terminating federal supervision over the Puyallup Indian reservation or constricting the boundaries of the original Puyallup Indian reservation, the original boundaries mark the area within which the fishing rights reserved to them by the Treaty of Medicine Creek may be exer-

cised without restriction by state laws or regulations."

It is true that in the footnote to the opinion of the Supreme Court of the United States previously referred to Justice Douglas says that the Court does not reach the issue of the present boundaries of the Puyallup Reservation, but for whatever reason the Court made that decision, the fact remains that the issue was presented.

This Court is not required to determine the conservation issue at this time. That is posed in other cases concerning the "prohibition of the use of set nets" in these fresh waters as a "reasonable and necessary conservation measure." Eventually this Court may be required, as directed by the Supreme Court of the United States, to make ultimate findings on the conservation issue and also cover the issue of equal protection implicit in the phrase "in common with."

The State of Washington and its Department of Game, pursuant to the statutory regulation regarding the taking of the said steelhead fish, may preclude the taking of said fish by any other means than the hook and line in the interest of conserving the resource.

Therefore, the motion of the United States Government to enjoin the State of Washington and its Department of Game from interfering with the taking of said steelhead fish from the Puyallup River

by Indians enrolled in the Reorganized Puyallup Tribe is denied, and the motion of the State of Washington declaring said State to possess the power to regulate the taking of steelhead fish on the Puyallup River by Indian descendants of enrolled members of the Reorganized Puyallup Tribe or members of said Reorganized Puyallup Tribe is granted, and that said State, pursuant to its laws and the rules and regulations by its Department of Game shall have said power provided that said rules and regulations for the taking of said steelhead fish apply equally to all persons, Indians and non-Indians alike.

Further, the said order applies to all areas of the Puyallup River including the navigable portion thereof which is stipulated to by the parties as extending to and beyond the upstream area where the United States Government contends that the Puyallup Indian Reservation boundaries of 1873 continue to exist, and the Court finds as a fact that said reservation boundary does not continue to exist as contended by the United States.

IT IS SO ORDERED.

DONE BY THE COURT this 29th day of January, 1973.

WILLIAM N. GOODWIN
United States District Judge

APPENDIX "B-3"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. 39-71C3

ORDER

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE STATE OF WASHINGTON,
Defendant.

The Court, in its Memorandum Decision, has rejected the contention of the United States that the 1873 boundaries of the then existing Puyallup Indian Reservation still exist.

It has been twice held to the contrary. *United States v. Kopp*, 110 Fed. 160 (1901). Subsequent to that decision, the Supreme Court of Washington has reached the same conclusion in *Goudy v. Meath*, 38 Wn. 126, 80 Pac. 295; *State v. Smokalem*, 37 Wn. 91, 79 Pac. 603.

The Puyallup Allotment Act, 27 Stat. 63; the appointment of a commissioner to superintend sale of allotments, 30 Stat. 87, the consent of the United States to the removal of restrictions upon alienation by Puyallup Indians of their allotted lands, 33 Stat. 565; the legislative intent expressed in the House

Committee Report No. 301, 58th Congress, Second Session (1904), in combination resulted in the almost total divestiture of the land within the 1873 reservation boundaries by the Indians. The Indian cemetery property was transferred by the Indian descendants of the members of the former Puyallup Tribe to certain individual trustees. The United States no longer supervised or claimed any right to supervise the activities of the said trustees in the performance of their duties as trustees of the said Cemetery Trust. Ex. JX 19, recorded March 25, 1908, dated in 1906.

The Indian Agency property, which no longer was the site of the Indian Agency and the home of the supervisor, was to be sold and the proceeds distributed to the tribal descendants. In 1948 the channel of the Puyallup River was altered by the United States Corps of Engineers to prevent the annual devastating floods that inundated the lands in the Puyallup River Valley. This was a part of what is known as the Mud Mountain Dam project, and the Mud Mountain Dam was constructed to regulate the flow of the Puyallup River during the periods of heavy runoff caused by melting snow in the Cascade Mountains where the river and its tributaries have their source.

The bed of the river as it existed in 1873 and the river channel within the 1873 boundaries of the reservation have been materially changed by this flood control project.

The unrestricted sale of the allotted lands has resulted in the population growth and establishment of incorporated and unincorporated towns, industrial complexes, a municipal corporation titled The Tacoma Port Authority, and many other commercial and residential areas on the land now claimed to be within the boundary of the Puyallup Indian Reservation. An examination of the relief map exhibited by the Government shows the extent of the development of the areas.

Of the 18,000 acres more or less lying within the Government's proposed reservation boundary, only approximately 30 acres are presently claimed to be land held by the United States in trust for the reorganized tribe.

The evidence supports the conclusion that the Puyallup Indian Reservation neither legally, actually, nor practically exists, nor is there any valid reason for its existence.

It is claimed by the United States that the members of the Reorganized Tribe have some claim to the present bed of the Puyallup River, and that water flowing over the river bed flows over reservation land, and that fish swimming in the water flowing over the reservation land may be captured by the Indians without regard to state conservation laws.

It is agreed that the Puyallup River is a navigable stream and title to the land normally is in the

United States, but assuming without deciding that by establishment of the reservation and subsequent alienation of the lands bordering the river are without reference to the bed of the river, and in the instrument the Indian allottee-grantor retains some interest in the riverbed, does it follow that the combined interest of all the riparian Indian allottees who alienated their allotments but did not transfer their riparian interests revitalizes the deceased reservation so that the bed of the river is now reservation land held in trust by the United States for the benefit of the descendants of the members of the original Puyallup Tribe or the members and descendants of the members of the Reorganized Puyallup Tribe? The common sense conclusion dictates that wherever title to the land may lay, the bed of the river is not an Indian reservation, and that the State of Washington owns the fish that swim in this navigable stream and may control by its conservation laws the manner in which said fish may be taken. Assuming without deciding that the members of the Reorganized Tribe have some claim to the present bottom of the Puyallup River, it does not follow that the riverbed is the Indian Reservation. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), decided title to a riverbed but did not reestablish or revive an Indian reservation that had been extinguished by legislation. Act of 1906, 44 Stat. 148.

The Puyallup tribal right to unrestricted fishing on the waters of the Puyallup River that flowed

through the 1873 reservation boundaries was extinguished when the reservation was extinguished and reorganization of the tribe did not revive it.

IT IS SO ORDERED.

DONE BY THE COURT this 31st day of January, 1973.

WILLIAM N. GOODWIN
United States District Judge

APPENDIX "B-4"

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. 39-71C3

NOTICE OF APPEAL

UNITED STATES OF AMERICA
Plaintiff,
v.
THE STATE OF WASHINGTON,
Defendant.

NOTICE is hereby given that the United States hereby appeals to the United States Court of Appeals

for the Ninth Circuit Court of Appeals from the Memorandum Decision of this Court entered in the above-captioned proceeding on January 29, 1973, and this Court's Order of January 31, 1973, which Decision and Order constitute a final judgment on the merits of this case after trial.

DATED this 1st day of February, 1973.

Respectfully submitted,

/s/ Signature Affixed
STAN PITKIN
United States Attorney

/s/ Signature Affixed
STUART F. PIERSON
Assistant U. S. Attorney

CERTIFICATE OF MAILING

I certify that I mailed a copy of the foregoing document to which this certificate is attached, to the attorneys of record, defendant, on the 1st day of Feb., 1973.

UNITED STATES ATTORNEY
By S. F. PIERSON